(1)

Supreme Court, U.S.
FILED

97 863 NOV 24 1997

OFFICE OF THE CLERK

No. 97-

In the Supreme Court of the United States

October Term, 1997

TAI ANH PHAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

John Kenneth Zwerling*
Lisa B. Kemler
ZWERLING & KEMLER, P.C.
108 North Alfred Street
Alexandria, Virginia 22314
(703) 684-8000
**Counsel of Record*

38 pp

1. QUESTIONS PRESENTED

1. Whether, for purposes of a conviction under 18 U.S.C. Section 924(c)(1), conduct that would not constitute "use" of a firearm, as that term is defined in *Bailey v. United States*, when the predicate offense is a substantive crime can constitute "use" when the predicate offense is a conspiracy.

2. Whether, when the Court of Appeals relies on or creates a new theory upon which to sustain a conviction which was never presented to the jury and which the jury never had to resolve in order to convict the defendant, the conviction should be vacated and a new trial granted.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... (I)

TABLE OF AUTHORITIES v

OPINION BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT 2

REASONS FOR GRANTING THE PETITION 9

I. THE QUESTION WHETHER, FOR PURPOSES OF A CONVICTION UNDER 18 U.S.C. SECTION 924(C)(1), CONDUCT THAT WOULD NOT CONSTITUTE "USE" OF A FIREARM, AS THAT TERM WAS DEFINED IN *BAILEY*, WHEN THE PREDICATE OFFENSE IS A SUBSTANTIVE CRIME CAN CONSTITUTE "USE" WHEN THE PREDICATE OFFENSE IS A CONSPIRACY IS AN IMPORTANT AND RECURRING ISSUE OF FEDERAL LAW THAT WOULD BENEFIT FROM CLARIFICATION BY THIS COURT 9

A. WHETHER THE PREDICATE OFFENSE IS A SUBSTANTIVE CRIME OR A CONSPIRACY, TO SUPPORT A CONVICTION UNDER SECTION 924(c)(1) FOR USE OF A FIREARM, THE FIREARM

MUST HAVE BEEN "ACTIVELY EMPLOYED" AS DEFINED BY *BAILEY* OR, AT LEAST, ITS ACTIVE EMPLOYMENT MUST BE PART OF THE AGREEMENT FOR THE COMMISSION OF THE OFFENSE WHICH WAS THE OBJECT OF THE CONSPIRACY 11

B. THE FOURTH CIRCUIT'S INTERPRETATION OF THE "USE" PRONG OF SECTION 924(c)(1) IS NOT A CORRECT APPLICATION OF THE *BAILEY* COURT'S DEFINITION OF "USE" OF A FIREARM 12

C. THE GOVERNMENT FAILED TO PROVE THAT PETITIONER "USE[D]" A FIREARM 15

II. THE QUESTION WHETHER, WHEN THE COURT OF APPEALS RELIES ON OR CREATES A NEW THEORY UPON WHICH TO SUSTAIN A CONVICTION WHICH WAS NEVER PRESENTED TO THE JURY AND WHICH THE JURY NEVER HAD TO RESOLVE IN ORDER TO CONVICT THE DEFENDANT, THE CONVICTION SHOULD BE VACATED AND A NEW TRIAL GRANTED IS AN IMPORTANT QUESTION OF FEDERAL LAW 16

A. THE APPEALS COURT AFFIRMED PETITIONER'S CONVICTION BASED ON A NEW THEORY OF LIABILITY 17

B. THE CREATION OF A NEW THEORY OF LIABILITY ON APPEAL IN COMBINATION WITH ERRONEOUS JURY INSTRUCTIONS

ON AN ESSENTIAL ELEMENT OF THE OFFENSE CAN NOT CONSTITUTE HARMLESS ERROR 18

CONCLUSION 19

TABLE OF AUTHORITIES

Cases **Page**

Bailey v. United States, 116 S.Ct. 501 (1995) ..... passim

Johnson v. United States, 117 S.Ct. 1544 (1997) 18

Pinkerton v. United States, 328 U.S. 640 (1946) 6,16

United States v. Chen, __ F.3d __, LEXIS 30038 (4th Cir. October 31, 1997) 19

United States v. Cummings, 937 F.2d 941 (4th Cir.), *cert. denied*, 502 U.S. 48 (1991) 17

United States v. Dean, 59 F.3d 1479 (5th Cir. 1995) 17

United States v. Elder, 88 F.3d 127 (2nd Cir. 1996) .. 7,14

United States v. Harwood, 998 F.2d 91 (2nd Cir. 1993) .. 16

United States v. Hawthorn, 94 F.3d 118 (4th Cir. 1996) .. 8

United States v. Jackson, 65 F.3d 631 (7th Cir. 1995) ... 17

United States v. Masotto, 73 F.3d 1233 (2nd Cir. 1996) 16,17

United States v. Meggett, 875 F.2d 24 (2nd Cir. 1989) ... 7

United States v. Olano, 507 U.S. 732 (1993) 18

United States v. Paz, 927 F.2d 176 (4th Cir. 1991) 6

United States v. Phan, 121 F.3d 149 (4th Cir. 1997) . passim

United States v. Resko, 3 F.3d 684 (3rd Cir. 1993) 17

United States v. Romero, 897 F.2d 47 (2nd Cir. 1990) 16,17

United States v. Rosario, 111 F.3d 293 (2nd Cir. 1997) ... 8

United States v. Smith, 94 F.3d 125 (4th Cir. 1996) 8

Statutes

18 U.S.C. § 1951 ..... passim

18 U.S.C. § 924(c)(1) ..... passim

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2255 10

PETITION FOR A WRIT OF CERTIORARI

Tai Anh Phan respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 121 F.3d. 149. The order denying rehearing en banc (Pet. App. 11a) is unreported.

JURISDICTION

The order of the United States Court of Appeals for the Fourth Circuit denying Phan's petition for rehearing was entered on August 26, 1997. Pet. App. 11a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 924(c)(1) of Title 18 of the United States Code provides, in pertinent part: "Whoever, during and in relation to any crime of violence or drug trafficking crime * * * uses or carries a firearm shall, in addition to the punishment provided for such crime * * *, be sentenced to imprisonment for five years * * *, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment * * *."

The Due Process Clause of the Fifth Amendment of the Constitution of the United States provides, in pertinent part: "No person shall * * * be deprived of * * * liberty * * * without due process of law * * *."

Section 1951 of Title 18 of the United States Code ("Hobbs Act") provides, in pertinent part: "Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan, or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both."

STATEMENT

In 1995, Tai Anh Phan was convicted and is presently incarcerated for conspiring to commit a "Hobbs Act" violation and for conduct - purportedly "using" a firearm by merely "discussing the need to carry firearms during the robbery with his criminal associates and provid[ing] [one co-conspirator] with two loaded handguns." (Pet. App. 5a). And, "on the day of the intended robbery, [one co-conspirator] transferred the handguns to [another co-conspirator], who then placed them under the seat of the [van] in which the conspirators traveled" to the place of the intended robbery. (Pet. App. 5a). The court of appeals held that this conduct constituted "active employment" within the meaning of this Court's decision in *Bailey v. United States*, 116 S.Ct. 501 (1995), and affirmed Phan's § 924(c)(1) conviction, thereby leaving in tact a five-year sentence which must run consecutive to the 63-month sentence he is serving on the Hobbs Act conspiracy conviction.

1. Phan and three associates were indicted in the United States District Court for the Eastern District of Virginia and charged with conspiracy to commit a robbery in violation of the Hobbs Act, 18 U.S.C. Section 1951, and using firearms during and in relation to a crime of violence in violation of 18 U.S.C. Section 924(c)(1). Prior to trial the three associates

pleaded guilty to the conspiracy to commit a Hobbs Act violation, but not to the Section 924(c)(1) violation. They all testified against Phan at trial; however, they all testified that, despite the presence of two firearms hidden in the van, they did not intend to use them in the commission of the robbery, nor had Phan instructed them to use firearms. The active employment of a firearm in the commission of the planned robbery was never contemplated by the conspirators.

Phan, Khai Bui, Tuan Nguyen, Minh Le and Anthony Wright (a confidential informant for the FBI) agreed to rob a gun dealer (the Mid-Atlantic sales representative for Glock, Inc.) who lived in Maryland and who, according to the informant, kept 400 new Glock handguns in his unsecured garage. The robbery was planned to take place on June 30, 1995. Based on information provided by the informant, the conspirators believed that the only person who would be home at the time of the robbery would be the gun dealer's teen-aged daughter. The plan called for Bui to drive a van with Nguyen and Le and they would follow the informant from Virginia to the gun dealer's home in Maryland. When they got to the home, the informant was supposed to go into the home first (disguised as a flower delivery man) and Bui was supposed to pull the van up to the garage so that the guns could be loaded into the van. Bui testified that if anyone other than the gun dealer's daughter was present in the home, the robbery was to be called off. (Tr. 11/7/95 at 198).

All three conspirators -- Bui, Nguyen and Le -- testified that there was never a plan or intent to use firearms in the robbery. (*Id.* at 198). Nguyen testified that on June 25, 1995, while he was at the Zei Club celebrating a friend's birthday, he met Phan outside the club and that Phan gave him two firearms to hold for him which Nguyen put into a friend's car. There was no mention of the proposed robbery when this event

allegedly occurred. (*Id.* at 141). Later that evening when he was leaving the club, Nguyen did not see Phan, so he took the two firearms home with him. (*Id.* at 142). In contrast, Bui testified that he went with Phan on June 25 to the Zei Club and that he did not see Phan bring any packages with him or carry any firearms that night. Bui testified further that Nguyen and Le were not at the Zei Club when he and Phan arrived. He further testified that he never saw Phan leave the club with Nguyen that evening, nor was he aware of Phan giving Nguyen any firearms that evening. (*Id.* at 191-92).[1]

On the morning of June 30, 1995, Bui met with Phan and the informant at Phan's house. Before Bui and the informant left to pick up Le and Nguyen, Phan gave Bui duct tape, a pair of gloves and a hundred dollar bill to buy flowers for the informant to use in his rouse to enter the gun dealer's home. (*Id.* at 179-83). The informant testified that Phan gave him a three-ring binder to use as a pretend delivery log. Bui testified that when he picked up Nguyen and Le in Phan's van, Nguyen gave him a shirt with two firearms wrapped in it. Bui put the package Nguyen gave him on the floor between the seats of the van. (*Id.* at 185). There was no evidence that Bui or Le had any prior knowledge of how or when Nguyen obtained the two firearms or that firearms were to be transported in the van. In fact, Le testified that he was unaware that there were any firearms in the van until after his arrest. (*Id.* at 114-15).

---

[1] The Fourth Circuit relied upon this alleged transfer of the firearms even though it was a contested issue and the question of whether or not this transfer ever took place was not one that the jury had to resolve in order to convict Phan under the trial court's pre-*Bailey* instructions. See Petition, *infra*. Furthermore, even if it did occur, Nguyen testified that this transfer had nothing to do with the robbery. [In fact, he did not join the conspiracy until four (4) days later.]

When the conspirators drove near the gun dealer's home, they suspected that there might be people in the house other than the daughter. Nguyen testified he told Bui to abort the robbery. Bui then drove past the gun dealers house and made a U-turn. (*Id.* at 148-49). As they were leaving the area, they were arrested. A search of the van disclosed the two loaded firearms located underneath the front passenger seat still wrapped in a white T-shirt. (*Id.* at 55-56).

Consistent with then-existing precedent, the trial court, without objection, gave the following instruction to the jury on the meaning of the terms "use" and "carry" in 18 U.S.C. § 924(c)(1):[2]

> The phrase "uses or carries a firearm" means having a firearm or firearms available to assist or aid in the commission of the crime alleged, in this case, in Count 1 of the indictment.
>
> In determining whether the defendant used or carried a firearm, you may consider all of the factors received in evidence in the case, including the nature of the underlying crime of violence or ***the proximity of the defendant or his co-conspirators to the firearm*** in question, the usefulness of the firearm to the crime alleged, and the circumstances surrounding the presence of the firearm. Of course, in this case, it's alleged there were two firearms.
>
> The Government is ***not required to show that the defendant actually displayed or fired the weapon***. The Government is required,

---

[2] Phan was only charged with "using" firearms, not "using or carrying."

> however, to prove beyond a reasonable doubt that ***the firearm was in the defendant's possession or under the defendant's control or under the possession and control of one of the defendant's co-conspirators*** -- this relates back to one of the other instructions I gave you previously -- at the time that the crime of violence was committed or attempted. (Emphasis added). (Tr. 11/8/95 at 212-14).

The other instruction the trial court referred to was an instruction based on *Pinkerton v. United States*, 328 U.S. 640 (1946), which holds that a conspirator can be held liable for the overt acts of every other conspirator committed in furtherance of the conspiracy and, therefore, can be convicted of substantive offenses committed during the course of the conspiracy.

On November 8, 1995, Phan was convicted of a conspiracy to commit a Hobbs Act violation and "using" firearms in violation of Section 924(c)(1). On January 26, 1996, Phan was sentenced to 123 months - 63 months for the conspiracy and 60 months (to be served consecutively) for the Section 924(c)(1) conviction.

2. Phan appealed his convictions to the Fourth Circuit. Because neither he, nor any of his co-conspirators, had "used" a firearm as this Court interpreted that term in *Bailey*, Phan sought to have his Section 924(c)(1) conviction reversed based on insufficient evidence. At the time of Phan's conviction, the Fourth Circuit -- like the majority of courts -- interpreted the term "use" in Section 924(c)(1) to include mere possession or proximity. *See United States v. Paz*, 927 F.2d 176, 178-79 (4th Cir. 1991). Approximately one month after Phan's trial and conviction, this Court issued its decision in

Bailey, substantially narrowing the range of conduct that could constitute "use" for purposes of a Section 924(c)(1) conviction. The Court held that "'use' must connote more than mere possession of a firearm" and that to "use" a firearm within the meaning of Section 924(c)(1), a person must "active[ly] employ[]" it by "brandishing, displaying, bartering, striking with, . . . firing or attempting to fire" the weapon. *Id.* at 506, 508-09. The Court, thus, overruled those circuit court opinions in which the only nexus required between the firearm and the predicate offense was the "availability," "accessibility," or "proximity" of the firearm to the defendant during the predicate offense. *Id.* at 506, 508.

The Fourth Circuit, finding that the "relevant question" before it was "whether Phan actively employed the handguns during and in relation to the conspiracy, not whether the handguns were actively employed during and in relation to the robbery[,]" noted that *"Bailey* offers only imperfect guidance." (Pet. App. 7).[3] In answering the question it posed in the affirmative, the Fourth Circuit relied on *United States v. Elder*, 88 F.3d 127 (2nd Cir. 1996), which held that a Hobbs Act conspiracy to commit armed robbery is a proper predicate offense for a Section 924(c)(1) conviction. In *Elder*, however, it was not difficult to conclude that the defendant had actively employed a firearm in the course of the conspiracy since he stipulated that, as a member of a Hobbs Act conspiracy, he participated in 16 truck hijackings or attempted hijackings and repeatedly "brandished a firearm," during three of the hijackings. *Id.* at 129. In addition to *Elder*, the Fourth Circuit cited *United States v. Meggett*, 875 F.2d 24, 29 (2nd Cir. 1989), for the proposition that the use of a firearm need not occur in connection with the ultimate object of the conspiracy in order to support a Section 924(c)(1) conviction. But *Meggett* is a

---

[3] No robbery occurred in this case.

pre-*Bailey* case whose holding was rejected by the Second Circuit in *United States v. Rosario*, 111 F.3d 293, 300 (2nd Cir. 1997).

In affirming Phan's Section 924(c)(1) conviction, the Fourth Circuit held that "[i]n the context of the inchoate crime of conspiracy to commit robbery, . . . the giving of firearms to a fellow conspirator constitutes active employment." (Pet. App. 8a). Disregarding the fact that each of the co-conspirators testified at trial that no one intended to use firearms in the intended robbery and that there was no evidence that the conspirators agreed to use of firearms in the robbery, the court of appeals found that "[t]he transfer of the handguns was done in ***preparation*** for their ***eventual use*** during the robbery. In other words, the active employment of the handguns was in itself an overt act in furtherance of the conspiracy." (Pet. App. 8a). (Emphasis added).

Phan petitioned for rehearing, arguing as he had at the oral argument that his conviction for using firearms in violation of Section 924(c)(1) should be reversed based on insufficient evidence. In addition, Phan argued that this conviction should be reversed and remanded for a new trial based on the trial court's erroneous jury instructions. As to his latter ground, Phan relied upon then controlling Fourth Circuit precedent -- *United States v. Hawthorne*, 94 F.3d 118 (4th Cir. 1996), and *United States v. Smith*, 94 F.3d 125 (4th Cir. 1996). In each of those cases, the Fourth Circuit vacated the defendants' Section 924(c)(1) convictions on the grounds that the jury had been erroneously instructed on the pre-*Bailey* definition of "use." Phan also argued that the theory upon which the appeals court found that Phan had "used" the firearms within the meaning of Section 924(c)(1) was a novel theory that was never presented to the jury and, in any event, was based on a contested factual allegation which, due to the faulty jury instructions, the jury

never had to resolve. The government's theory at trial, as presented in its closing argument, was that Phan was guilty of violating Section 924(c)(1) because the conspirators possessed the firearms in the van and they were available for their use. (Tr. 11/8/95 at 784).

The court of appeals denied Phan's petition for rehearing and suggestion for rehearing en banc on August 26, 1997.

REASONS FOR GRANTING THE PETITION

I. THE QUESTION WHETHER, FOR PURPOSES OF A CONVICTION UNDER 18 U.S.C. SECTION 924(c)(1), CONDUCT THAT WOULD NOT CONSTITUTE "USE" OF A FIREARM, AS THAT TERM WAS DEFINED IN *BAILEY*, WHEN THE PREDICATE OFFENSE IS A SUBSTANTIVE CRIME CAN CONSTITUTE "USE" WHEN THE PREDICATE OFFENSE IS A CONSPIRACY IS AN IMPORTANT AND RECURRING ISSUE OF FEDERAL LAW THAT WOULD BENEFIT FROM CLARIFICATION BY THIS COURT

If the Fourth Circuit's decision is a correct interpretation of the meaning of the term "use" in Section 924(c)(1), then this Court's decision in *Bailey* has been gutted. This case presents an important question. It has the potential to affect every conspiracy which qualifies as a predicate offense under Section 924(c)(1) where firearms are present or possessed but not "actively employed." Based upon the Fourth Circuit's reasoning, a person can be convicted of violating Section 924(c)(1) when the predicate offense is a conspiracy and where the evidence shows that the firearm was merely acquired and possessed by one or more conspirators.

The Fourth Circuit complained in its opinion that the *Bailey* decision provided it with little guidance in deciding what conduct constitutes "use" of a firearm within the meaning of Section 924(c)(1) where the underlying crime is a conspiracy as opposed to a substantive crime. Seizing the language in *Bailey* where the Court stated that "'use' takes on different meanings depending on context" (*Bailey*, 116 S.Ct. at 508), the Fourth Circuit concluded that, "in the context of the inchoate crime of conspiracy to commit robbery, .. . the giving of firearms to a fellow conspirator constitutes active employment." (Pet. App. 8a). As we explain below (Pet., Section IB, *infra*), the Fourth Circuit's interpretation is not a correct reading of *Bailey* and if it remains the law, will result in an expansion of the range of conduct that may constitute "use" for purposes of a Section 924(c)(1) conviction, including conduct which this Court specifically rejected in *Bailey*.

The question presented by this case is an important question of federal law. Since *Bailey* was decided, the courts of appeals have been faced with numerous cases involving Section 924(c)(1) convictions either on direct appeal or collateral challenges to convictions under 28 U.S.C. § 2255, and they are still grappling with the term "use." The case herein presents the Court with an opportunity to clarify this matter once and for all and to provide needed guidance to the lower federal courts to determine whether the facts are sufficient to support a Section 924(c)(1) conviction for use of a firearm during or in relation to a drug crime or a crime of violence, whether the predicate offense is a substantive crime or a conspiracy to commit that substantive crime. Due to the severe penalties that result from one or more convictions for a

violation of Section 924(c)[4] and the frequency that firearms are possessed, but not actively employed, in the course of conspiracies to commit a drug crime or a crime of violence, there is a need to limit the reach of this added punishment to only those situations for which Congress intended it to apply.

A. Whether The Predicate Offense Is A Substantive Crime Or A Conspiracy, To Support A Conviction Under Section 924(c)(1) For Use Of A Firearm, The Firearm Must Have Been "Actively Employed" As Defined By *Bailey* Or, At Least, Its Use Must Have Been Part Of The Agreement For The Commission Of The Offense Which Was The Object Of The Conspiracy.

As stated previously, in *Bailey* this Court held that the term "use" in Section 924(c)(1) "requires evidence sufficient to show an active employment of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense." 116 S.Ct. at 505. In explaining what Congress meant by "active employment," the Court suggested conduct such as "brandishing, displaying, bartering, striking with, . . ., firing or attempting to fire, a firearm." *Id.* at 508. In so holding, the Court specifically rejected the government's position that mere possession of a firearm for intended or potential use during the commission of a predicate offense qualifies as "use." The Court stated ". . ., liability attaches only to cases of actual use, not intended use, as when an offender places a firearm with the intent to use it later if necessary." *Id.* at 507. The Court even ruled out conduct such as "storage of

---

[4] Section 924(c)(1) provides, in part, that "[i]n the case of a second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machine gun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release."

a firearm" or concealment of a firearm "to be at the ready of an imminent confrontation" as constituting "use" within the meaning of Section 924(c)(1). The Court reasoned that "[s]torage of a firearm, without its more active employment, is not reasonably distinguishable from possession" and, with respect to the concealment scenario, where the firearm "is not disclosed or mentioned by the offender, it is not actively employed, and it is not "'used.'" *Id.* at 508.

To sustain a conviction under Section 924(c)(1), it is submitted that whether the predicate offense is a substantive crime, as was the case in *Bailey*, or an inchoate crime, such as the conspiracy charged in the case herein, the same analysis of whether the facts support a finding of "use" of a firearm must apply. The *Bailey* Court made no distinction between a substantive crime or an inchoate crime, rather the Court's analysis focused on the meaning of the term "use." If "put[ting] a gun into place to protect drugs or to embolden [oneself]" was not enough to constitute active employment within the context of a substantive crime (*Bailey*, 116 S.Ct. at 508), then there is no reason that agreeing to put a firearm into place to protect or embolden the participants should be sufficient within the context of a conspiracy.

B. The Fourth Circuit's Interpretation Of The "Use" Prong Of Section 924(c)(1) Is Not A Correct Application Of The *Bailey* Court's Definition Of "Use"

The Fourth Circuit, in affirming Phan's Section 924(c)(1) conviction, held that, even though the firearms were not actually "used" as that term was defined in *Bailey* by any member of the conspiracy in the commission of a crime of violence, merely having the firearms available as part of the plan is enough where the underlying crime charged is a conspiracy to commit robbery. If this is a correct interpretation

of *Bailey* then every conspiracy to commit a drug offense or violent crime where a firearm was kept at the ready in case of a confrontation will carry the added penalty for "use" of a firearm as was the case pre-*Bailey*.[5]

Stating that it did not have to find that Phan, or even a co-conspirator, actively employed firearms in one of the ways listed in *Bailey*, the Fourth Circuit mistakenly found solace in the *Bailey* Court's language that "'use' takes on different meanings depending on context." *Bailey*, 116 S.Ct. at 508. In relying on this language to distinguish a substantive crime from an inchoate crime, the Fourth Circuit disregarded the context to which the *Bailey* Court referred. In discussing the meaning of the term "use," this Court referred to an example: "I use a gun to protect my house, but I've never had to use it." The Court then explained:

> In the first phrase of the example, "use"refers to an ongoing, inactive function fulfilled by a firearm. It is this sense of "use" that underlies the Government's contention that "placement for protection" -- i.e., placement of a firearm to provide a sense of **security** or to embolden -- constitutes a "use." It follows, according to this argument, that a gun placed in a closet is "used," because its mere presence emboldens or protects its owner. We disagree. Under this reading, mere possession of a firearm by a drug offender, at or near the site of a drug crime or

---

[5] The United Sentencing Guidelines ("U.S.S.G.") already provide a significant additional punishment for possession of a firearm during the commission of drug or Hobbs Act conspiracies that do not involve active employment of the firearm. See U.S.S.G. Sections 2D1.1(b)(1) and 2B3.1(b)(2)(C) which permit a 2-level and 5-level enhancement, respectively, in a defendant's base offense level where a firearm was possessed during a drug or Hobbs Act violation.

> its proceeds or paraphernalia, is a "use" by the offender. Because its availability for intimidation, attack, or defense would always, presumably, embolden or comfort the offender. But the inert **presence** of a firearm, without more, is not enough to trigger § 924(c)(1) merely for storing a weapon near drugs or drug proceeds.

Id. (Emphasis added).

The factual basis for the Fourth Circuit's ruling falls exactly within the type of conduct this Court found could not constitute "use"-- "[t]he transfer of the handguns was done in preparation for their eventual use during the robbery." (Pet. App. 8a).

In *Elder*, the case relied on by the Fourth Circuit, the defendant challenged his conviction for using and carrying a firearm during and in relation to a Hobbs Act conspiracy. *Elder*, 88 F.3d at 127. The Second Circuit held that where the defendant "has 'used' his firearm, as that term is elucidated in *Bailey*, . . ., ***in connection with a violent crime that was a goal or modus operandi of the conspiracy***, that conspiracy may properly serve as a predicate felony for a charge under § 924(c)." *Id.* at 129. (Emphasis added). It is clear from the facts in *Elder* that the active employment of firearms was part of the agreement since firearms were brandished during several of the Hobbs Act robberies and the brandishing of the firearms were overt acts of the conspiracy. Thus, it is clear that, unless the conduct involving the firearm in connection with the predicate offense (substantive or inchoate) constitutes "active employment" as defined by *Bailey*, a Section 924(c)(1) conviction can not be sustained.

C. The Government Failed To Prove That Petitioner "Use[d]" A Firearm

There was no evidence that Phan or any of the co-conspirators ever "used" a firearm as that term was defined in *Bailey*. While only one of Phan's three co-conspirators testified that Phan gave him two firearms to hold and that, on the day of the planned robbery, Phan told him to take the firearms and give them to the person who picked him up (Tr. 11/7/95 at 442), all of the conspirators consistently testified that they never intended to use firearms in the commission of the robbery. Moreover, there was no evidence that Phan and the other conspirators had ever agreed to actually employ firearms during the robbery. There was no evidence that Phan or any of the conspirators brandished, displayed, fired, pointed, or otherwise actively employed either of the two firearms found in the van "during and in relation to" the predicate offense of conspiracy to commit a Hobbs Act violation. Assuming co-conspirator Nguyen's testimony to be true that Phan gave him the two firearms to hold and that on the day of the planned robbery Phan told him to give the firearms to the person who picked him up, this conduct does not constitute active employment as defined in *Bailey*. It is submitted that, under *Bailey*, conduct that would have qualified as "use" within the meaning of Section 924(c)(1) could have consisted of conduct such as Phan using a firearm to coerce a reluctant co-conspirator into committing the robbery or one or more of the conspirators actually brandishing a firearm in the commission of the robbery or had the plan called for someone to actively employ firearms during the robbery-- the intended object of the conspiracy. No such conduct occurred in this case. Under the circumstances of this case, Phan plainly did not violate Section 924(c)(1) and his conviction should be reversed.

II. THE QUESTION WHETHER, WHEN THE COURT OF APPEALS RELIES ON OR CREATES A NEW THEORY UPON WHICH TO SUSTAIN A CONVICTION WHICH WAS NEVER PRESENTED TO THE JURY AND WHICH IS BASED ON CONTESTED FACTUAL ALLEGATIONS WHICH THE JURY NEVER HAD TO RESOLVE IN ORDER TO CONVICT THE DEFENDANT, THE CONVICTION SHOULD BE VACATED AND A NEW TRIAL GRANTED IS AN IMPORTANT QUESTION OF FEDERAL LAW

The jury that convicted Phan on the Section 924(c)(1) charge was presented with only one theory for conviction; that is, he was guilty of "using" firearms based on the presence of firearms, the proximity of Phan or his co-conspirators to the firearms, and the possession of firearms by Phan or his co-conspirators. The jury's verdict convicting Phan for using firearms in violation of Section 924(c)(1) is a direct result of the trial court's erroneous instructions which permitted a conviction based on "the proximity" of Phan or his co-conspirators to the firearm and their possession of the firearm (Tr. 11/8/95 at 818). In addition, the trial court's *Pinkerton* instruction permitted a conviction based upon a theory of vicarious liability.[6] (Tr. 11/7/95 at 208). Although the courts of appeals have permitted a jury to be instructed on the *Pinkerton* theory of liability in connection with a Section

---

[6] To convict a defendant under a *Pinkerton* theory of liability, "the jury must [have found] that the defendant was a member of a conspiracy" and that "the offenses committed by his co-conspirators were reasonably foreseeable consequences of ***acts furthering the unlawful agreement.***" *United States v. Masotto*, 73 F.3d 1233, 1241-42 (2nd Cir. 1996), quoting *United States v. Harwood*, 998 F.2d 91, 100 (2nd Cir. 1993), and *United States v. Romero*, 897 F.2d 47, 51 (2nd Cir. 1990). (Emphasis added).

924(c) charge,[7] the facts still must support a finding of active employment. See e.g., *United States v. Masotto*, 73 F.3d 1233, 1242 (2nd Cir. 1996), where the defendant was convicted, *inter alia*, of a conspiracy to commit a robbery in violation of the Hobbs Act and a Section 924(c)(1) violation based on a *Pinkerton* theory of liability. In that case, based in part on the testimony of a co-conspirator that he and another conspirator, during a hijacking of a truck, used a gun to force the driver out of the truck, the Second Circuit had no difficulty finding that "guns were used to carry out the truck robberies" and, therefore, "the jury could have found that the guns were used in furtherance of the conspiracy to commit robbery." *Id.* This is a far cry from Phan's conduct in merely asking a co-conspirator to hold two firearms for him and then telling that same co-conspirator to give the guns to another co-conspirator. It is not even clear from the evidence why Phan asked Nguyen to hold the firearms for him or why he had Nguyen give them to Bui.[8]

A. The Appeals Court Affirmed Petitioner's Conviction Based On A New Theory Of Liability

On appeal, however, the Fourth Circuit created a new theory of liability for a Section 924(c)(1) conviction when the predicate offense is a conspiracy and the object of the

---

[7] See *United States v. Romero*, 897 F.2d at 51; *United States v. Jackson*, 65 F.3d 631 (7th Cir. 1995); *United States v. Dean*, 59 F.3d 1479 (5th Cir. 1995); *United States v. Resko*, 3 F.3d 684 (3d Cir. 1993); *United States v. Cummings*, 937 F.2d 941 (4th Cir.), *cert. denied*, 502 U.S. 948 (1991).

[8] Since there was never any discussion among the conspirators that firearms would be used in the robbery, it is conceivable that Phan merely wanted to get back the two firearms he had previously given to Nguyen. There is simply no evidence to support a finding that the guns were used in furtherance of the conspiracy to commit robbery in this case.

conspiracy – in this case, a robbery – is not committed. Under these circumstances, the Fourth Circuit held that "*Bailey* can only be applied in a more general sense." (Pet. App. 7a). Contrary to the teaching of *Bailey*, the Fourth Circuit held that "the giving of firearms to a fellow conspirator constitutes active employment" where the transfer "was done in preparation for their eventual use during the robbery." (Pet. App. 8a). The Fourth Circuit's analysis not only blurs the distinction between "use" and "carry," but it is completely at odds with the holding in *Bailey* where this Court stated that there is no Section 924(c)(1) liability for cases involving "intended use, as when an offender places a firearm with the intent to use it later if necessary." *Bailey*, 116 S.Ct. at 507.

B. The Creation of A New Theory Of Liability On Appeal In Combination With Erroneous Jury Instructions On An Essential Element Of The Offense Can Not Constitute Harmless Error

Where, as here, the trial court misinstructed the jury regarding an essential element of the offense and the appellate court, in order to affirm a defendant's conviction, relies on or creates a new theory of liability which was never presented to the jury, the error can not constitute harmless error. The jury instruction given by the trial court regarding the definition of "use" of a firearm was plainly erroneous in light of *Bailey*. The misinstruction in combination with the appellate court's creation of a new theory of liability to support a Section 924(c)(1) conviction clearly affected the substantial rights of Phan. *United States v. Olano*, 507 U.S. 725, 732 (1993).[9] It can not be said that the trial court's "misinstruction on 'use'

---

[9] In *Johnson v. United States*, 117 S.Ct. 1544 (1997), this Court stated that misinstructing the jury on an essential element of the offense is "an error that which is subject to harmless error analysis." 117 S.Ct. 1550.

was 'unimportant' in relation to everything else the jury considered on the issue in question." *United States v. Chen*, F.3d _, LEXIS 30038, *33 (4th Cir., October 31, 1997) (en banc) (Williams, J., concurring opinion) (citation omitted). In *Chen* the Fourth Circuit found the misinstruction to be harmless error, however, the defendants clearly actively employed firearms by holding hostages captive at gunpoint. As there was no active employment of firearms in Phan's case, at a minimum, he is entitled to a new trial.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

John Kenneth Zwerling*
Lisa B. Kemler
ZWERLING & KEMLER, P.C.
108 North Alfred Street
Alexandria, Virginia 22314
(703) 684-7900
**Counsel of Record*

November 1997

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v. 96-4219

TAI ANH PHAN,
Defendant-Appellant,

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria,
Leonie M. Brinkema, District Judge.
(CR-95-329-A)

Argued: April 10, 1997

Decided: July 29, 1997

Before RUSSELL and LUTTIG, Circuit Judges, and
PHILLIPS, Senior Circuit Judge.

Affirmed by published opinion. Judge Russell wrote the opinion, in which Judge Luttig and Senior Judge Phillips joined.

COUNSEL

ARGUED: John Kenneth Zwerling, ZWERLING & KEMLER, P.C., Alexandria, Virginia, for Appellant. James L. Trump, Assistant United States Attorney, Andrew Gerald

McBride, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellee. **ON BRIEF**: Lisa B. Kemler, ZWERLING & KEMLER, P.C., Alexandria, Virginia, for Appellant. Helen F. Fahey, United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria Virginia, for Appellee.

OPINION

RUSSELL, Circuit Judge:

Tai Anh Phan acted as a confidential informant for the FBI starting in May 1995. As part of his cooperation agreement, Phan promised not to engage in any criminal activity. Within a few weeks of entering into the agreement, however, Phan decided to rob a gun dealer with the help of a criminal associate, Anthony Wright. Demonstrating that there is really no honor among thieves, Wright also became an FBI informant and told agents about the robbery plan, leading to Phan's arrest.

Phan's downfall began in March 1995 when he called Wright in Atlanta and discussed plans to travel from Virginia to Atlanta in order to engage in credit card fraud. Wright contacted an agent of the United States Secret Service and arranged to record his phone conversations with Phan. The Secret Service conducted a brief investigation, paid Wright for his help, but ended its inquiry in the middle of April.

Phan asked Wright to come to Virginia. Wright agreed. On April 25, 1995, Wright telephoned FBI headquarters in Washington, D.C. and asked to speak to someone about Phan. Wright's call was directed to Agent Charles Knowles, who was one of Phan's contacts at the FBI. Wright talked to Agent Knowles and took down his name and telephone number.

In May 1995, Wright moved from Atlanta to Virginia and

initially stayed with Phan at his home in Falls Church. Phan asked Wright about any possible criminal enterprise in which they could participate. Wright said that he knew a gun dealer, Richard Perkins, who kept a number of guns in his house. Perkins was the Mid-Atlantic sales representative for Glock, Inc., a large manufacturer of semi-automatic handguns. Phan expressed interest in robbing Perkins.

On May 30, 1995, Wright again contacted Agent Knowles and told him that Phan was planning to rob a gun dealer. Agent Knowles instructed Wright to call him if he got any further information. The FBI opened an informant file for Wright on June 7, 1995, and Wright began to receive money form the agency in mid-June.

Meanwhile, Phan engaged in affirmative steps toward robbing Perkins, including: 1) telephoning Perkins and pretending to be a United Parcel Service driver in order to get the exact address of Perkins' house; 2) soliciting three other criminal associates, Tuan Nguyen, Khai Bui, and Minh Le, to participate in the robbery; 3) establishing the plan for the robbery; and 4) instructing Wright to map out the area surrounding Perkins' house. Wright recorded a number of his phone conversations with Phan during which they discussed the robbery and the eventual sale of the stolen guns.

As part of Phan's cooperation agreement, Agent Knowles and another FBI agent met with Phan on June 15, 1995. They asked Phan if he had any information on illegal guns, robberies, home invasions, burglaries, or gang activity. Phan told the agents this activity was "not his style," and that he did not associate with anyone who committed those types of crimes.

Phan informed the members of the conspiracy that they would be using guns as part of the robbery. In a taped conversation, Phan assured Wright that the other conspirators

would not hesitate to subdue Perkins by any means necessary. On June 24, 1995, Phan met with Tuan Nguyen and gave him a bag containing two handguns. Phan asked Nguyen to keep the handguns.

Finally, on June 30, 1995, Phan called the conspirators and told them the robbery would take place that day. Phan instructed Nguyen to bring the handguns and give them to Khai Bui. With the FBI following every move, Nguyen, Bui, Le and Wright drove to Perkins' house. Phan did not go along. The FBI intervened just as the robbery was about to begin, arrested all of the participants, and seized two loaded handguns.

A grand jury indicted Phan with conspiracy to commit robbery in violation of the Hobbs Act, 18 U.S.C. § 1951, and a superseding indictment added a charge for using a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924 (c)(1). Nguyen, Bui, and Le eventually pleaded guilty to Hobbs Act violations. Everyone involved in the crime testified against Phan at his trial. Phan filed a number of pre-trial motions, including a motion to dismiss the indictments based on outrageous government conduct. The district court denied Phan's motion without prejudice to his renewing the motion after trial.

At trial, Phan argued that he had acted under public authority, or, alternatively, the government's actions amounted to entrapment. After the close of evidence, the district court refused to instruct the jury on entrapment because of the lack of evidence tending to establish inducement by the government and the overwhelming evidence of predisposition to the crime on the part of Phan. The jury returned a verdict of guilty on both counts of the indictment. The district court again denied Phan's motion to dismiss the indictment based on outrageous government conduct. Phan was sentenced to 63 months on Count One and 60 months on Count Two to be served consecutively.

Phan appeals his convictions based on the sufficiency of the evidence establishing the § 924 (c)(1) violation and the district court's refusal to give an entrapment instruction.

I.

The indictment in this case charged Phan with using the handguns in violation of § 924 (c)(1). According to the Supreme Court in *Bailey v. United States*,[1] the government must demonstrate the handguns were "actively employed" in order to prove they were used in the manner contemplated by the statute. Phan discussed the need to carry firearms during the robbery with his criminal associates and provided Nguyen with two loaded handguns. On the day of the intended robbery, Nguyen transferred the handguns to Bui, who placed them under the seat of the car in which the conspirators traveled to Perkins' home. The question on appeal is whether these activities constituted the active employment of firearms during and in relation to the predicate offense of conspiracy to commit robbery.[2] We apply the familiar standard that a conviction is supported by sufficient evidence if, when viewing the evidence in the light most favorable to the government, we are able to conclude that a rational jury could have found each of the essential elements of the offense beyond a reasonable doubt.[3]

Bailey addressed the meaning of "use" within the context of two cases in which drug traffickers were found with drugs

---

[1] 116 S.Ct. (1995).

[2] Under the *Pinkerton* doctrine, *Pinkerton v. United States*, 328 U.S. 640 (1946), Phan is liable for the overt acts of every other conspirator done in furtherance of the conspiracy. *See United States v. Gironda*, 758 F.2d 1201, 1211-15 (7th Cir. 1985)(applying *Pinkerton* doctrine to hold defendants liable for use of firearm under § 924(c)), disapproved in part on other grounds, *United States v. Durrive*, 902 F.2d 1221, 1226 (7th Cir. 1990).

[3] *Jackson v. United States*, 443 U.S. 307, 319 (1979).

and firearms in their possession. Mere possession of a firearm, the Supreme Court held, is insufficient to establish use. Instead, the offender must have actively employed the firearm.[4] The Court offered a non-exclusive list of what constitutes active employment, including "brandishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire, a firearm."[5]

Phan argues that he did not actively employ the handguns because the FBI arrested the conspirators before the robbery took place. At best, Phan states, the evidence demonstrates that he intended to use the handguns during the robbery. According to *Bailey*, § 924 (c)(1) "liability attaches only to cases of actual use, not intended use, as when an offender places a firearm with the intent to use it later."[6]

Phan's argument that he cannot be held liable for his mere intent to use a firearm might be persuasive if robbery were the predicated offense. A Hobbs Act conspiracy to commit robbery, however, is a separate crime of violence providing its own predicate for § 924 (c)(1) liability.[7] The relevant question is whether Phan actively employed the handguns during and in relation to the conspiracy, not whether the handguns were

---

[4] *Bailey*, 116 S.Ct. at 508.

[5] *Id. See United States v. Hawthorne*, 94 F.3d 118, 120 (4th Cir. 1996)("One might imagine any number of ways that a firearm may be actively employed, and the Supreme Court has enumerated a few...")

[6] 116 S.Ct. at 507.

[7] *See United States v. Elder*, 88 F.3d 127, 128-29 (2nd Cir. 1996)(per curiam)(holding that Hobbs Act conspiracy to commit armed robbery is by definition a felony involving substantial risk that physical force may be used and therefore is a proper predicate for a § 924 (c)(1) conviction).

actively employed during and in relation to the robbery.[8] And on this question, unfortunately, *Bailey* offers only imperfect guidance.

Bailey deals with the application of § 924(c)(1) when the predicate offense is a substantive crime. Conspiracy, however, is an inchoate crime. As stated by the Supreme Court, our legal system "identifies the agreement to engage in a criminal venture as an event of sufficient threat to social order to permit the imposition of criminal sanctions for the agreement alone, plus an overt act in pursuit of it, regardless of whether the crime agreed upon actually is committed."[9] The post-*Bailey* application of § 924 (c)(1) in cases where conspiracy to commit a violent crime is the predicate offense, and the underlying crime has been committed, is straightforward. For example, in *United States v. Elder*,[10] the defendant brandished a firearm during three of the truck hijacking that formed the basis for his Hobbs Act conspiracy conviction. The Second Circuit had no difficulty finding that the defendant "used" the firearm as that term is elucidated in *Bailey*.[11] When the agreed-upon crime is never committed, however, *Bailey* can only be applied in a more general sense.

If Phan had merely possessed the handguns at the time of the conspiracy, even if he intended to use them during the robbery, we would be forced to vacate his conviction under

---

[8] *See United States v. Meggett*, 875 F.2d 24, 29 (2nd Cir. 1989)(holding that use of firearm need not occur in connection with ultimate object of conspiracy in order to support a § 924 (c)(1) conviction) abrogated on other grounds, *United States v. Rosario*, 111 F.3d 293, 300 (2nd Cir. 1997)(recognizing *Bailey* standard).

[9] *United States v. Feola*, 420 U.S. 671, 694 (1975).

[10] 88 F.3d 127 (2nd Cir. 1996).

[11] *Id.* at 129.

Bailey.[12] On the other hand, we do not have to find that Phan actively employed the handguns in one of the ways listed in Bailey in order to affirm his conviction. As noted by the Court, "use" takes on different meanings depending on context.[13] In the context of the inchoate crime of conspiracy to commit robbery, we find that the giving of firearms to a fellow conspirator constitutes active employment.

Of course, the second element of a § 924 (c)(1) conviction must also be satisfied. It is not enough that Phan gave the handguns to Nguyen, who subsequently turned them over to Bui. The use of the firearm must take place during and in relation to the conspiracy.[14] In this case, however, the nexus between the handguns and the conspiracy to commit robbery could not be closer. The transfer of the handguns was done in preparation for their eventual use during the robbery. In other words, the active employment of the handguns was in itself an overt act in furtherance of the conspiracy.

Even in light of the Supreme Court's holding in Bailey, there is more than sufficient evidence to support the jury's finding that Phan used the handguns during and in relation to the conspiracy to commit robbery. Accordingly, we affirm Phan's conviction.

II.

A valid entrapment defense contains two elements: 1)

---

[12] 116 S.Ct. at 508 ("[T]he inert presence of a firearm, without more, is not enough to trigger § 924 (c)(1)."). *See United States v. James*, 79 F.3d 553, 554 (7th Cir. 1996)(vacating § 924(c)(1) conviction predicated on drug trafficking conspiracy because defendant merely possessed firearm).

[13] 116 S.Ct. at 508.

[14] *United States v. Richardson*, 86 F.3d 1537, 1549 (10th Cir.)(discussing relevant cases), *cert. denied*, 117 S.Ct. 588 (1996).

government inducement and 2) a lack of predisposition to commit the crime on the defendant's part.[15] The district court must determine that the defendant has met his initial burden of producing more than a scintilla of evidence of entrapment before submitting the issue to the jury.[16] The district court's refusal to give an entrapment instruction is a matter of law review de novo.[17]

Phan failed to offer more than a scintilla of evidence that the government entrapped him into committing a crime. We are doubtful that a reasonable jury could conclude theat Wright was acting for or on behalf of any law enforcement agency when he suggested the gun dealer as a potential target for Phan.[18] Agent Knowles opened an informant file for Wright on June 7, 1995, and Wright began to receive payments from the FBI in mid-June. This process took place after Phan had begun to make preparations for the robbery and had discussed his plans with other conspirators.

Even if Wright were viewed as a government informant based on his history as an informant and his initial contact with Agent Knowles, there is no evidence of inducement as a matter of law. Inducement involves the elements of government overreaching and conduct designed to implant a criminal design in the mind of an innocent party.[19] Wright told Phan about the gun dealer in response to Phan's request for information concerning a crime they could commit. The idea

---

[15] *United States v. Singh*, 54 F.3d 1182, 1189 (4th Cir. 1995).

[16] *Id.*

[17] *Id.*

[18] *See United States v. Perl*, 584 F.2d 1316, 1321 (4th Cir. 1978)(defendant must produce evidence of government involvement in scheme to entrap).

[19] *United States v. Daniel*, 3 F.3d 778 (4th Cir. 1993).

that Phan was an innocent party, or needed any help formulating a criminal design, is completely unbelievable. Finally, no reasonable jury could find that Phan was not predisposed to commit the crime charged. His eager and ready response to Wright's suggestion, combined with the leadership role he assumed, belies any argument that Phan was an unwilling participant.[20] Phan's claim is meritless.

III.

For the foregoing reasons, Phan's conviction under § 924 (c)(1) and the district court's refusal to submit the issue of entrapment to the jury are affirmed.

AFFIRMED

---

[20] *See Jacobson v. United States*, 503 U.S. 540, 550 (1992)(ready commission of criminal act demonstrates predisposition).

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
August 26, 1997

No. 96-4219
CR-95-329-A

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

TAI ANH PHAN

Defendant - Appellant

On Petition for Rehearing with Suggestion for Rehearing In Banc

---

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/S/ Patricia S. Connor
Clerk

Supreme Court, U.S.
FILED
JAN 26 1998
CLERK

(2)

No. 97-863

In the Supreme Court of the United States

OCTOBER TERM, 1997

TAI ANH PHAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
WILLIAM C. BROWN
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

15 pp

QUESTIONS PRESENTED

1. Whether the evidence of the conspirators' use of firearms, during and in relation to a conspiracy to commit a robbery, was sufficient to support petitioner's conviction under 18 U.S.C. 924(c)(1).

2. Whether the trial court's erroneous instruction regarding "use" of a firearm requires reversal of petitioner's conviction under 18 U.S.C. 924(c)(1).

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Adickes v. *S.H. Kress & Co.*, 398 U.S. 144 (1970)	9
Bailey v. *United States*, 516 U.S. 137 (1995)	4, 6
Carella v. *California*, 491 U.S. 263 (1989)	10
Johnson v. *United States*, 117 S. Ct. 1544 (1997)	9, 11
Pinkerton v. *United States*, 328 U.S. 640 (1946)	3
Pope v. *Illinois*, 481 U.S. 497 (1987)	10
Rose v. *Clark*, 478 U.S. 570 (1994)	10
Smith v. *United States*, 508 U.S. 223 (1995)	8
United States v. *Chen*, 1997 WL 691139 (4th Cir. Oct. 31, 1997)	10
United States v. *Chirinos*, 112 F.3d 1089 (11th Cir.), cert. denied, No. 97-5023, 1998 WL 5569 (Jan. 12, 1998), cert. denied, No. 96-5738, 1998 WL 5571 (Jan. 12, 1998)	10
United States v. *Holland*, 116 F.3d 1353 (10th Cir.), cert. denied, 118 S. Ct. 253 (1997)	10
United States v. *Hawthorne*, 94 F.3d 118 (4th Cir. 1996)	7
United States v. *Holmes*, 93 F.3d 289 (7th Cir. 1996)	10
United States v. *Lovasco*, 431 U.S. 783 (1977)	9
United States v. *Miner*, 108 F.3d 967 (8th Cir.), cert. denied, 118 S. Ct. 259 (1997)	10
United States v. *Olano*, 507 U.S. 725 (1993)	9

Cases—Continued: Page

United States v. *Pimentel*, 83 F.2d 55 (2d Cir. 1996) 10
United States v. *Price*, 76 F.3d 526 (3d Cir. 1996) .. 10
United States v. *Smith*, 44 F.3d 1259 (4th Cir.), cert. denied, 514 U.S. 1113 (1995) 9
United States v. *Taylor*, 102 F.3d 767 (6th Cir. 1996), cert. denied, 118 S. Ct. 327 (1997) 10
United States v. *Wilson*, 116 F.3d 1066, reh'g *en banc* granted *sub nom. United States* v. *Brown*, 123 F.3d 213 (5th Cir. 1997) 10

Wilson v. *O'Leary*, 895 F.2d 378 (7th Cir. 1990) 9
Zobrest v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) 9

Statutes:

Hobbs Act, 18 U.S.C. 1951 ..... 2, 4, 5
18 U.S.C. 924(c) 5, 6, 8, 9, 10
18 U.S.C. 924(c)(1) 2, 3, 4, 5, 10

In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-863

TAI ANH PHAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 121 F.3d 149.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 1997. A petition for rehearing was denied on August 26, 1997. Pet. App. 11a. The petition for a writ of certiorari was filed on November 24, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted of conspiring to commit robbery in

violation of the Hobbs Act, 18 U.S.C. 1951, and of using firearms during and in relation to that conspiracy, in violation of 18 U.S.C. 924(c)(1). Pet. App. 4a. Petitioner was sentenced to 63 months of imprisonment on the Hobbs Act count and to a consecutive term of 60 months of imprisonment on the firearms count, to be followed by three years of supervised release. *Ibid.* The court of appeals affirmed. *Id.* at 1a-10a.

1. In May 1995, petitioner asked a criminal associate, Anthony Wright, about any possible criminal enterprise in which they could participate. Pet. App. 2a-3a. Wright said that he knew of a gun dealer, Richard Perkins, who kept a number of guns in his house. Petitioner expressed interest in robbing Perkins. Unbeknownst to petitioner, Wright contacted the Secret Service and revealed that petitioner was planning to rob a gun dealer. Meanwhile, petitioner engaged in affirmative steps toward robbing Perkins, including: (1) telephoning Perkins and pretending to be a United Parcel Service driver in order to get the exact address of Perkins' house; (2) soliciting three other criminal associates, Tuan Nguyen, Khai Bui, and Minh Le, to participate in the robbery; (3) establishing the plan for the robbery; and (4) instructing Wright to map out the area surrounding Perkins' house. Wright recorded a number of his phone conversations with petitioner during which they discussed the robbery and the eventual sale of the stolen guns. *Id.* at 3a.

Petitioner informed the members of the conspiracy that they would be using guns as part of the robbery. Pet. App. 3a. In a taped conversation, petitioner assured Wright that the other conspirators would not hesitate to subdue Perkins by any means necessary.

Id. at 3a-4a. On June 24, 1995, petitioner met with Tuan Nguyen and gave him a bag containing two handguns. Petitioner asked Nguyen to keep the handguns. On June 30, 1995, petitioner called the conspirators and told them the robbery would take place that day. Petitioner instructed Nguyen to bring the handguns and give them to Khai Bui. With the FBI following every move, Nguyen, Bui, Le, and Wright drove to Perkins' house. Petitioner did not go along. The FBI intervened just as the robbery was about to begin, arrested all of the participants, and seized the two loaded firearms. *Id.* at 4a.

2. The court of appeals affirmed petitioner's convictions, rejecting petitioner's argument that the evidence was insufficient to support his Section 924(c)(1) conviction for using firearms during and in relation to a crime of violence. Pet. App. 5a-8a.[1] The court observed that petitioner discussed the need to carry firearms during the robbery with his criminal associates, that he provided Nguyen with two loaded handguns, and that on the day of the intended robbery, Nguyen transferred the handguns to Bui, who placed them under the seat of the car in which the conspirators traveled to the intended victim's home. *Id.* at 5a. The court found that the evidence was sufficient to show that the weapons were "actively employed" during and in relation to the predicate offense of conspiracy to commit robbery. *Id.* at 5a-8a; see *id.* at 5a n.2 (noting that under *Pinkerton* v. *United States*, 328 U.S. 640 (1946), petitioner was responsible for the

---

[1] The court of appeals also rejected petitioner's argument that the district court erred in declining to give a requested instruction presenting the issue of entrapment to the jury. Pet. App. 8a-10a. Petitioner has not renewed that claim here.

use of the firearms by his co-conspirators in furtherance of the conspiracy).

Petitioner argued that the firearms were not actively employed because the conspirators were arrested before the intended robbery took place. Pet. App. 6a. The court of appeals observed, however, that the predicate offense in this case was not robbery itself but the Hobbs Act conspiracy to commit robbery and that the firearms were employed during that conspiracy when they were transferred among the conspirators. *Ibid.*; *id.* at 8a. The court also held that, because the transfer of the handguns "was done in preparation for their eventual use during the robbery," the evidence established that the use of the firearms took place "during and in relation to" the conspiracy. *Ibid.*

ARGUMENT

1. Petitioner first contends (Pet. 9-15) that the evidence was insufficient to show "use" of the firearms in violation of 18 U.S.C. 924(c)(1). The court of appeals correctly rejected that claim.

The court of appeals recognized that, pursuant to the rule established in *Bailey* v. *United States*, 516 U.S. 137 (1995), the government was required to demonstrate that the handguns were "actively employed" during and in relation to the conspiracy to commit robbery. Pet. App. 5a, 8a. Viewed in the light most favorable to the government, the evidence at trial showed that: (1) petitioner discussed the need to carry firearms during the robbery with his criminal associates; (2) he provided his co-conspirator Nguyen with two loaded handguns; and (3) on the day of the intended robbery, at petitioner's direction, Nguyen transferred the handguns to Bui, who placed them

under the seat of the car in which the conspirators traveled to the victim's home. Pet. App. 4a. The fact-bound determination by the court of appeals that those particular circumstances were sufficient under *Bailey* to constitute active employment of the firearms during and in relation to the conspiracy is correct, does not conflict with the decisions of this Court or of any other court of appeals, and does not merit further review.[2]

Petitioner incorrectly asserts (Pet. 9) that the court of appeals' decision allows a person to be convicted under Section 924(c) "where the evidence shows that the firearm was merely acquired or possessed by one or more conspirators." To the contrary, the court of appeals specifically noted that "[i]f [petitioner] had merely possessed the handguns at the time of the conspiracy, even if he intended to use them during the robbery, we would be forced to vacate his conviction." Pet. App. 7a. The evidence showed far more than mere possession. The evidence showed that petitioner transferred the handguns to a co-conspirator, who, at petitioner's direction, in turn gave the weapons to the other co-conspirators, with whom petitioner had discussed using guns during the

---

[2] The specific question presented in this case is not likely to recur. Petitioner was indicted before this Court's decision in *Bailey*, and the description of the Section 924(c)(1) charge in the indictment explicitly charged petitioner only with using handguns during and in relation to a Hobbs Act conspiracy to commit robbery. In light of *Bailey*, future Section 924(c) indictments arising from similar circumstances would likely explicitly refer to carrying liability under Section 924(c). Petitioner does not claim, nor could he, that the evidence at trial was insufficient to show that the weapons were carried during and in relation to the conspiracy.

robbery and who drove with the guns to the scene of the robbery. Pet. App. 3a-4a, 8a; see also C.A.J.A. 194 (petitioner's recorded statement to Wright that, if the robbery victim resisted with a gun, the victim's "gotta go"); *id.* at 418-419 (petitioner's statement to co-conspirator Minh Le that guns would be used in the robbery and that petitioner would provide them). It was "giving the firearms to a fellow conspirator" that the court of appeals found constituted "active employment" of the weapons sufficient to establish a violation of Section 924(c) during and in relation to the conspiracy. Pet. App. 8a.

Contrary to petitioner's contention (Pet. 9-14), that determination by the court of appeals does not conflict with *Bailey*, *supra*. *Bailey* addressed the meaning of "use" within the context of two cases in which drug traffickers had drugs and firearms in their possession. Mere possession of a firearm, this Court held, is insufficient to establish use. *Bailey*, 516 U.S. at 143. Instead, the firearm must have been "actively employed." *Id.* at 147.[3] The *Bailey* Court described a non-exclusive list of what constitutes active employment, including "brandishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire, a firearm," *id.* at 148, but the Court did not

---

[3] *Bailey* makes clear that active employment must mean something other than "carr[ying]" because Congress intended each of the terms "uses" and "carries" to have "a particular, nonsuperfluous meaning." 516 U.S. at 146. Under the interpretation adopted by the court of appeals in this case, a firearm can be used without being carried, *e.g.*, when it is transferred between conspirators for intended use in the conspiracy (even if neither conspirator handles the weapon); and a firearm can be carried without being used, *e.g.*, when a conspirator keeps a gun hidden in his clothing during the conspiracy.

hold that those were the only activities that could meet the statutory requirement. See *ibid.* (explaining that the list "describe[s] *some* of the activities that fall within 'active employment,'") (emphasis added); see also *United States* v. *Hawthorne*, 94 F.3d 118, 120 (4th Cir. 1996) ("One might imagine any number of ways that a firearm may be actively employed, and the Supreme Court has enumerated a few.").[4]

The court of appeals also correctly rejected petitioner's claim, which he reasserts in passing here (Pet. 17 & n.8), that the evidence was insufficient to show that the use of the firearms was "during and in relation to" the conspiracy. As the court of appeals held:

> the nexus between the handguns and the conspiracy to commit robbery could not be closer. The transfer of the handguns was done in preparation for their eventual use during the robbery. In other words, the active employment of the hand-

---

[4] Petitioner's sufficiency claim fails even under his own theory (Pet. 15) of the limits on the possible meanings of "use" in a conspiracy case. Petitioner concedes that the evidence would have been sufficient to demonstrate use under *Bailey* "had the plan called for someone to actively employ firearms during the robbery—the intended object of the conspiracy." *Ibid.* But, construed in the light most favorable to the government, the evidence established just that. The evidence showed that petitioner transferred the handguns to a co-conspirator, who, at petitioner's direction, in turn gave the weapons to the other co-conspirators, with whom petitioner had discussed using guns during the robbery and who drove with the guns to the scene of the robbery. Pet. App. 3a-4a, 8a; see also C.A.App. 194, 418-419; pages 5-6, *supra*. A trier of fact could reasonably have concluded from that evidence that the plan called for active employment of the firearms during the robbery.

> guns was in itself an overt act in furtherance of the conspiracy.

Pet. App. 8a. As discussed at pages 5-6, *supra*, the evidence showed that petitioner told his co-conspirators that he would provide them with handguns to use in the robbery. It also showed that he provided them with those handguns, which they transported to the scene of the robbery. See *id.* at 3a-4a, 8a; C.A.App. 194, 418-419. That evidence was sufficient to permit a trier of fact to conclude that the use of the handguns was "during and in relation to" the conspiracy. See *Smith* v. *United States*, 508 U.S. 223, 237-238 (1995) ("in relation to" is "expansive," means "with reference to" or "as regards," and "clarifies that the firearm must have some purpose or effect with respect to the [underlying] crime," *i.e.*, must "facilitat[e], or ha[ve] the potential of facilitating," the offense).

2. Petitioner also contends (Pet. 16-20) that his Section 924(c) conviction should be reversed because the trial court's instruction regarding "use" of a firearm was incorrect under *Bailey*,[5] and the jury therefore could not properly evaluate the conflicting evidence regarding that element of the offense. Petitioner did not object at trial that the "use" instruction did not require "active employment," nor did he raise the instructional error based on *Bailey* in his opening brief or in his reply brief in the court of appeals. Rather, in his appellate briefs he relied on

---

[5] The trial court's instruction did not require the jury to find "active employment" of the firearms in order to convict petitioner for "use" under the Section 924(c) count. See C.A.App. 817-819. The "use" instruction was therefore incorrect under the rule announced in *Bailey*.

Bailey only in support of his argument that the evidence was insufficient to establish a violation of Section 924(c).[6] Because petitioner failed properly to raise the claim that the instruction was erroneous before the court of appeals and the court of appeals did not opine on that claim, the claim is not properly presented in this Court. See *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993); *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

In any event, the erroneous instruction would not require reversal of petitioner's conviction under the applicable plain error standard of review. See *Johnson* v. *United States*, 117 S. Ct. 1544 (1997); *United States* v. *Olano*, 507 U.S. 725 (1993). Ample evidence was presented to support petitioner's Section 924(c)(1) firearms conviction. As described above, the evidence showed that petitioner and his co-conspirators actively employed firearms during and in relation to the conspiracy to commit robbery by transferring the firearms among themselves and transporting the firearms to the scene of the robbery with the intent to use the weapons during the robbery. See Pet. App. 3a-4a, 8a; C.A.App. 194, 418-419; pages 5-6, *supra*. Moreover, no rational jury could have found that petitioner and his co-conspirators used the firearms without also finding facts that

---

[6] Petitioner did raise the "use" instruction issue in his petition for rehearing in the court of appeals, and we are advised that the issue may also have arisen during oral argument in that court. The court of appeals had discretion to decline to address that untimely argument, see *United States* v. *Smith*, 44 F.3d 1259, 1265-1266 (4th Cir.), cert. denied, 514 U.S. 1113 (1995); *Wilson* v. *O'Leary*, 895 F.2d 378, 384 (7th Cir. 1990), and indeed the court did not address the issue in its opinion.

would conclusively establish that the co-conspirators carried the firearms.[7] See, *e.g.*, *United States* v. *Holland*, 116 F.3d 1353, 1359 & n.4 (10th Cir.), cert. denied, 118 S. Ct. 253 (1997).[8] Cf. *Carella* v. *California*, 491 U.S. 263, 266 (1989) (per curiam); *Pope* v. *Illinois*, 481 U.S. 497, 503 (1987); *Rose* v. *Clark*, 478 U.S. 570, 580-581 (1994). Petitioner asserts (Pet. 3-5, 15) that the only evidence of "use" was that petitioner

---

[7] Although the indictment cited 18 U.S.C. 924(c)(1), which makes criminal both "us[ing]" and "carr[ying]" firearms during and in relation to a crime of violence, the indictment alleged that the petitioner's violation of Section 924(c) was based on the co-conspirators' use of the weapons. See C.A.App. 20. In accordance with the full text of Section 924(c), the jury was instructed on both "us[ing]" and carr[ying]." See *id.* at 817-818. Petitioner did not object to that aspect of the instruction.

[8] The courts of appeals are nearly unanimous in concluding that reversal is unnecessary when a jury's findings of guilt under an erroneous "use" instruction necessarily establish liability for "carrying" under Section 924(c). See *Holland*, 116 F.3d at 1359 & n.4; *United States* v. *Chirinos*, 112 F.3d 1089, 1096-1097 (11th Cir.), cert. denied, No. 97-5023, 1998 WL 5569 (Jan. 12, 1998), cert. denied, No. 97-5738, 1998 WL 5571 (Jan. 12, 1998); *United States* v. *Miner*, 108 F.3d 967, 969 (8th Cir.), cert. denied, 118 S. Ct. 259 (1997); *United States* v. *Taylor*, 102 F.3d 767, 771 (6th Cir. 1996), cert. denied, 118 S. Ct. 327 (1997); *United States* v. *Holmes*, 93 F.3d 289, 294-295 (7th Cir. 1996); *United States* v. *Pimentel*, 83 F.3d 55, 60 (2d Cir. 1996); *United States* v. *Price*, 76 F.3d 526, 529-530 (3d Cir. 1996). See also *United States* v. *Chen*, Nos. 95-5036, 95-5042, 1997 WL 691139, at *12-13 (4th Cir. Oct. 31, 1997) (en banc) (Williams, J., joined by Wilkinson, C.J., & Russell, Wilkins, Niemeyer & Wittig, JJ., concurring). The Fifth Circuit, the only court of appeals that has rejected that proposition, has granted rehearing *en banc* to reconsider the issue. See *United States* v. *Wilson*, 116 F.3d 1066, reh'g *en banc* granted *sub nom. United States* v. *Brown*, 123 F.3d 213 (5th Cir. 1997).

gave the firearms to co-conspirator Nguyen; that Nguyen transported the firearms home with him; that Nguyen gave the firearms to co-conspirator Bui when Bui and Wright picked up Nguyen and co-conspirator Le on the day planned for the robbery; and that the co-conspirators drove the weapons to the scene of the robbery, at which time they were arrested, and the police seized the weapons. Each of those events clearly involved "carrying." In light of the evidence presented, the error in the instructions neither affected petitioner's substantial rights nor seriously affected the fairness, integrity, or public reputation of judicial proceedings. See *Johnson*, 117 S. Ct. at 1549-1550.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
WILLIAM C. BROWN
Attorney

JANUARY 1988